Supreme Court, U.S.
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NO. _____

In The

Supreme Court of the United States

Spring Term, 1993

KENDALL STOCKSTILL,

Petitioner,

V.

SHELL OIL COMPANY,

Respondent,

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the qualified privilege allowed under Louisiana law to an entity in making disclosures about an employee in an investigatory situation to a governmental agency extends this privilege to the entity and its other agents when the only other agent making the statements could be presumed to be in good faith and who had relied upon a file put together by other agents in a manner showing a careless disregard for the truth of the matter being disclosed.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following parties have an interest in the outcome of this proceeding.

Kendall Stockstill	-Petitioner
Shell Oil Company	-Respondent

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OPINIONS AND REPORTS

The opinion of the Court of Appeals for the Fifth Circuit has been reported at 3 F. 3d 868.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 27, 1993. The United States Court of Appeals for the Fifth Circuit's denial of rehearing was rendered on October 28, 1993. Therefore, the

jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

STATUTE AND REGULATIONS INVOLVED

28 U.S.C. Section 1254 (1)

STATEMENT OF THE CASE

On September 11, 1990, Kendall Stockstill, a joint employee of Shell Oil Company (Shell) and Coastline Construction Company (Coastline), filed an age discrimination complaint against Shell and Coastline, Thereafter, another joint employee of Shell and Coastline, Manuel T. Mayeaux, filed a similar complaint. These cases were consolidated April 22, 1991.

Stockstill, while working in Alaska, was informed by personnel from the Equal Employment Opportunity Commission (EEOC) that Shell believed he had been involved in a sexual harassment case. He could not comprehend this and considered the actions taken against him a mistake. Discovery was taken from Shell in the ADEA case, and it was in these documents from Shell that he first became aware of the nature and magnitude of the charge that Shell had made to the (EEOC) regarding his alleged actions toward a female employee of Shell. It was at that time also, that the identity of the alleged victim, Barbara Jean (B. J.) Holcombe even to him. Stockstill therefore filed a partition for defamation in the Civil District Court for the Parish of Orleans, State of Louisiana, on June 24, 1991.

On July 11, 1991, Shell filed its notice for removal and subsequently filed a motion for consolidation with the previous cases on July 17, 1991. The trial Judge granted Shell's motion and the removed case was consolidated on July 25, 1991.

The complaints for age discrimination were dismissed on November 7, 1991 upon Shell and Coastline's Motion for Summary Judgment. Thereafter, only Stockstill's claim of defamation remained before the District Court. Shell then moved, on September 17, 1991, for summary judgment on his defamation claim. This motion was denied on October 9. 1991. Shell then filed an Amended Motion for Summary Judgment on March 24, 1992 which was likewise denied on April 8, 1992.

After a jury trial on April 13 and 14, 1992, the trial Judge granted Shell's Motion For Judgment As a Matter of Law. Judgment was accordingly entered that same day, dismissing with prejudice Stockstill's defamation claim.

Kendall Stockstill timely filed his Notice of Appeal on May 5, 1992. On September 27, 1993, after oral argument on June 8, 1993, the Fifth Circuit Court of Appeals rendered a judgment affirming the lower courts findings. A re-hearing was denied by the United States Court of Appeals for the Fifth Circuit on October 28, 1993. In App.

ARGUMENT

In Toomer v. Breaux, 146 So. 2d 723 (La. App. 3d Cir. 1962) the court defined the scope of a qualified or conditional privilege in the State of Louisiana. This court found that "[A] publication enjoys a "qualified" or conditional privilege if the communication is made (a) in good faith, (b) on any subject matter in which the person communicating has a interest or in reference to which he has a duty, (c) to a person having corresponding interest or duty. This privilege arises from the social necessity of permitting full and unrestricted communication concerning a matter in which the parties have an interest or duty, without inhibiting free communication in such instances by the fear that the communicating party will be held liable in damages if the good faith communication

later turns out to be inaccurate.

In affirming the District Court's ruling, the Appellate Court found that Shell Oil Company (Shell) was entitled to a qualified privilege under Louisiana Law. This decision was based primarily upon the alleged good faith of Ms. R. Ann Ford, the Shell employee responsible for disseminating information to an agency, in this case the Equal Employment Opportunity Commission (EEOC). The Appellate Count found that since Ms. Ford had not participated in the investigation then she acted without malice when she opened petitioner's personnel file and made her report to the EEOC. Therefore, her statements were entitled to a qualified privilege. Since Ms. Ford was an agent for Shell, this qualified privilege extended to the entity as well.

This ruling by the Appellate Court has placed an unheard of burden upon the American worker and given carte blanche to any employer which merely establishes a "personnel department" behind which to hide.

The Appellate Court totally disregarded Shell's responsibility and duty towards its employees. An entity must bear the responsibility for any and all information going into the worker's personnel file, since there always exists the possibility that the information contained within will someday have to be disseminated as in the case at bar. The petitioner agrees that an entity should have the right to disseminate information to a governmental agency in an employment investigation without fear of reprisal. This right must be used with malice towards none and an absolute regard for the truth. A mistake or an error is almost certain in cases concerning an entity as large as Shell. The mistake or error should not be used to condemn an entity, and a mistake or error is not the problem in this case.

Under Louisiana law malice must be proved either by the knowledge of the falsity of the statement made or by a reckless disregard for the truth. The evidence in this case

shows there was a reckless disregard for the truth. This careless disregard for the truth is shown by (1) the length of the investigation, (2) the discrepancy between the number of persons alleged to have been interviewed and actually interviewed, (3) the deliberate failure to interview the victim and (4) the deliberate failure to interview the petitioner. The evidence shows that Shell could not have exercised due diligence in it's investigation. Shell stipulated that the petitioner was dismissed on September 12, 1988 and not on October 3, 1988 as Shell later contended. The only person to accuse the petitioner was interviewed by Shell on September 8, 1988, just four (4) days prior to petitioner's dismissal. Thus, it was impossible for Shell to speak with the 45-50 people it claims to have interviewed.

Shell based its termination of petitioner on his alleged acts of inappropriate conduct of a sexual nature against Barbara Jean Holcombe. Barbara Jean Holcombe stated on the stand and in an affidavit that the petitioner had never sexually harassed her. Though the language that was used between them could be interpreted by some as inappropriate, it was commonplace and acceptable among all employees.

The Appellate Court has ruled that when an agent making allegedly defamatory statements relies on a file that has been put together by others with a careless or reckless disregard for the truth of the matters contained within, she acts in good faith. However, this ruling is contrary to all principles of agency law. When a taxpayer hires an accountant to do his tax returns, the accountant relies upon the information given to him by the client. If the information is false or incorrect, the accountant's good faith in compiling the return does not extend to the taxpayer and protect him from the Internal Revenue Service. Therefore, the granting of qualified privilege to Ms. Ford should not be extended to Shell.

CONCLUSION

For all the above and foregoing reasons this Court should grant Certiorari hear, decide and redefine the limits of qualified privilege as stated by Louisiana law.

Respectfully submitted,

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IN THE UNITED STATES OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3415

KENDALL STOCKSTILL,

Plaintiff-Appellant,
Cross-Appellee.

versus

SHELL OIL COMPANY,

Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(October 28, 1993)

Before E. GARZA and DEMOSS, Circuit Judges, and ZAGEL, District Judge. *

---

* District Judge of the Northern District of Illinois sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause bee and the same is hereby DENIED; THE MOTION TO SUBSTITUTE COUNSEL IS GRANTED.

ENTERED FOR THE COURT:

EMILIO M. GARZA
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3415

KENDALL STOCKSTILL,

Plaintiff-Appellant
Cross-Appellee,

versus

SHELL OIL COMPANY,

Defendant-Appellee
Cross-Appellant.

Appeall for the United States District Court for the
Eastern District of Louisiana

Before EMILIO M. GARZA and DeMOSS, Circuit Judges, and ZAGEL, District Judge.

Zagel, District Judge.

PER CURIAM:

The Judgement of the District court is **AFFIRMED.**

(The eleven page judgment is recorded at 3 F. 3d 868.)

(3)

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Spring Term, 1993

KENDALL STOCKSTILL,

Petitioner,

V.

SHELL OIL COMPANY,

Respondent,

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

SUPPLEMENTAL APPENDIX

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Before E. GARZA and DeMOSS, Circuit Judges, and ZAGEL , District Judge.

Zagel, District Judge

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby **DENIED; THE MOTION TO SUBSTITUTE COUNSEL IS GRANTED.**

ENTERED FOR THE COURT:

EMILIO M. GARZA
United States Circuit Judge

App. 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3415

KENDALL STOCKSTILL,

Plaintiff-Appellant
Cross-Appellee,

versus

SHELL OIL COMPANY,

Defendant-Appellee
Cross-Appellant.

Appeals for the United States District Court for the
Eastern District of Louisiana

Before EMILIO M. GARZA and DeMOSS, Circuit Judges, and ZAGEL,[1] District Judge.

Zagel, District Judge.

I.

Kendall Stockstill is a former employee of Coastline Constrction, Inc., an independent contractor that supplies welding services to Shell Oil Company. In the fall of 1988 Shell informed Coastline that Stockstill would no longer be

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[1] District Judge of the Northern District of Illinois, sitting by designation.

allowed on Shell facilities. Shell's action against Stockstill stemmed from its investigation of a sexual harassment and discrimination charge filed in the summer of 1988 by B.J. Holcombe, a former employee of a Shell subsidiary. As part of its investigation into Holcombe's charge, Shell interviewed an employee named Galen "Skipper" Berne. Berne told Shell's investigators that he had seen touching and heard name calling between Holcombe and Stockstill. Berne also said he heard rumors that Stockstill placed a dildo in Holcombe's lunch bag. This information led Shell to ban Stockstill from its facilities. Shell did not interview Stockstill or B.J. Holcombe as part of its investigation.

Stockstill filed a charge of age discrimination against Shell with the Equal Employment Opportunity Commission (EEOC). Subsequently, Stockstill filed suit in federal district court alleging age discrimination, as well as violations of ERISA and title VII against Shell and Coastline. Ann Ford, a Shell employee, was responsible for coordinating the company's response to charges filed with the EEOC. Ford had several telephone conversations with Althea Bertrand, an EEOC investigator, about Stockstill's age discrimination charge. Bertrand asked Ford why Shell barred Stockstill from its facilities. When first confronted with this question, Ford explained that Shell was not accusing Stockstill of sexual harassment but that he had engaged in inappropriate conduct in violation of Shell's policies. Ford based her explanation on information contained in the investigative file compiled in connection with B.J. Holcombe's charge of sexual harassment and discrimination. In a subsequent conversation the EEOC investigator pressed Ford for specifics. Ford then told Bertrand that Stockstill's conduct was "inappropriate" and "of a sexual nature." There were no further conversations between Shell employees and officials of the EEOC. Nor did Shell discuss the investigation with anyone outside of Shell other than the EEOC.

In 1991 Stockstill filed the defamation suit against

Shell that is the subject of this appeal. The district court granted Shell's motion to consolidate Stockstill's 1990 action with the defamation suit. After consolidating the lawsuits, the district court granted summary judgment for Shell and Coastline on the age discrimination, ERISA and Title VII claims[2]. Before trial, Shell also filed two summary judgment motions on Stockstill's defamation claim. In the first motion Shell sought a ruling that statements made to the EEOC in response to a charge of discrimination are entitled to a qualified privilege. Shell contended that the qualified privilege forced Stockstill to prove malice or lack of good faith in order to prevail. Judge Carr denied the motion stating that a triable issue remained as to whether Shell acted in good faith in making the alleged defamatory statements[3]. In an amended summary judgment motion Shell argued that statements made to the EEOC in response to a charge of discrimination are entitled to an absolute privilege. Judge Carr denied Shell's amended motion as well.

The case proceeded to trial before a jury on April 13, 1992. B.J. Holcombe testified that Stockstill had called her a "bitch" but had never sexually harassed her. Stockstill

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2 The district court entered a partial judgment under Rule 54(b) on the dismissed claims and this Court dismissed Stockstill's appeal for lack of jurisdiction on February 28, 1992. The United States Supreme Court subsequently denied Stockstill's application for a Writ of Certiorari.

3 Judge Carr apparently agreed with Shell that Ford's statements to the EEOC investigator were qualifiedly privileged. This must be so since Judge Carr later granted jugdment as a matter of law in favor of Shell because Stockstill failed to show that Ford made the allegedly defamatory comments with malice or in bad faith. This would also explain why Shell did not appeal the district court's denial of their initial summary judgment motion.

admitted that he called Holcombe a "bitch" but would not agree that such conduct was inappropriate. On April 14, at the conclusion of Stockstill's case, the district court granted Shell's motion for judgment as a matter of law. The court held that there was no evidence that the statements made to the EEOC were made with malice or in bad faith.

Stockstill appeals the district court's judgment in favor of Shell and the court's exclusion of evidence regarding Stockstill's claim of age discrimination. Shell cross appeals the district court's denial of its motion for summary judgment based on absolute privilege. We affirm.

II.

Stockstill makes multiple arguments for reversal, all of which lack merit. Initially, he contends the trial court erred when it granted Shell's motion for a judgment as a matter of law. We review the district court's judgment as a matter of law de novo. In the Matter of Worldwide Trucks, Inc., 948 F.2d 976, 979 (5th Cir. 1991). In so doing, we examine the entire record in the light most favorable to the part opposing the motion, drawing all reasonable inferences in favor of that party. Id. Before a judgment as a matter of law (formerly a directed verdict) will be granted, "the facts and inferences must point so strongly and overwhelmingly in favor of the moving party that no reasonable jury could arrive at a contrary conclusion." Id. But a "mere scintilla of evidence" is not sufficient to present an issue for the jury." Id.

Stockstill says that after he presented his case-in-chief "there was sufficient conflict in substantial evidence to create a jury question" as to whether Shell acted with malice. Appellant's Brief at 8. Stockstill is mistaken. Of the two areas of "conflict" he identifies one is immaterial and the other presents no conflict at all.

One "conflict" concerns the date of Stockstill's discharge. Stockstill says that while the parties stipulated to a

discharge date of September 12, 1988, Shell executives testified that he was discharged on October 3, 1988. Stockstill interprets this discrepancy as an attempt by Shell to bolster its claim that its action against him came after extensive investigation. Stockstill's focus on the date of discharge and the thoroughness of Shell's investigation is misplaced. What matters is whether Ann Ford, who did not participate in the investigation of Holcombe's sexual harassment charge, acted with malice or reckless disregard for the truth when she relied on the Shell investigative file in responding to the EEOC investigator's inquiries. The answer to that question is not affected by the three-week discrepancy concerning Stockstill's date of discharge.

The other alleged evidentiary "conflict" that Stockstill complains of relates to Shell's defense at trial. Stockstill asserts that before trial Shell maintained it discharged Stockstill because he engaged in inappropriate conduct of a sexual nature. During trial Shell stated that the inappropriate conduct took the form of inappropriate language. Based on his brief, it is difficult to know why Stockstill finds Shell's positions irreconcilable or, for that matter, why any of this matters. It suffices to say that Shell's contentions before trial are not inconsistent with its defense at trial. Inappropriate conduct of a sexual nature does not necessarily imply that the conduct at issue included physical contact. Conduct that is inappropriate and of a sexual nature can just as easily take the form of verbal abuse. That is what Shell maintains occurred in this case and the record supports Shell on this point. In short, neither of the evidentiary "conflicts" identified by Stockstill warrant reversal of the district court's judgment as a matter of law in favor of Shell.

Next, Stockstill asserts, without elaboration, that he did not have to show falsity or malice at trial because Shell's statements were defamatory per se. This argument rings hollow. Ford's cautiously worded explanation for why Shell took action against Stockstill does not amount to an explicit

accusation that he sexually harassed or discriminated against anyone. Cf. Rouly v. Enserch Corp., 835 F.2d 1127, 1129 (5th Cir. 1988)(remarks not defamatory per se where defendant did not explicitly accuse plaintiff of criminal activity). If the words "inappropriate conduct of a sexual nature" are defamatory, their "intent and meaning ... must be gathered not only from the words singled out as libelous, but from the context as well ..." Madison v. Bolton, 102 So.2d 433,438 (La. 1958). By definition, therefore, the statements at issue are not defamatory per se because a defamatory per se statement must be defamatory on its face, without reference to its context. Id., see Rouly, 835 F.2d at 1129 (defamatory per se statements analyzed "without reference to their context"). As noted below, Stockstill himself concedes that the words spoken by Ann Ford to the EEOC investigator take on a defamatory innuendo when considered in the context of the sexual harassment investigation in which they were uttered.

Perhaps sensing the futility of his defamatory per se argument, Stockstill argues alternatively that the allegedly defamatory statements carry a defamatory innuendo for which the truth of the statements is not a defense unless the innuendo is likewise truthful. Stockstill reasons that the allegedly defamatory statements, arising as they did in the investigation of B.J. Holcombe's sexual harassment charge, carry the innuendo that Stockstill was involved in the sexual harassment of Holcombe. According to Stockstill, even if Shell was unaware of the falsity of this innuendo, it was for the jury to decide whether Shell exhibited a reckless disregard for the truth when it relied on one employee's version of Stockstill's treatment of B.J. Holcombe.

This argument suffers from two fatal flaws. First, it wrongly focuses on Shell's investigation rather than whether or not Ford exhibited malice by relying on Shell's investigative file when responding to EEOC inquiries. Second, Stockstill presented no evidence that Shell acted recklessly in its

investigation or that Ann Ford recklessly relied on the investigative file. Stockstill offered no evidence, for example, that Ford, or anyone at Shell, knew that the alleged defamatory statements were false when they were spoken to the EEOC.[4] In fact, the record supports Ford's good faith belief in the accuracy of the information contained in the investigative file. Ford based her remarks to the EEOC on notes taken during an interview of "Skipper" Berne, and Berne confirmed the accuracy of the notes at trial. Nor did Stockstill offer evidence that anyone at Shell acted recklessly in believing the information supplied by "Skipper" Berne. Instead, Stockstill simply denied any wrongdoing.

Shell correctly notes that even if the statements are defamatory per se, the plaintiff must still prove malice when the circumstances of a communication are such that the person who made the statement is entitled to a qualified privilege. And Shell maintains that Ford's statements to the EEOC are entitled to such a privilege. "Qualified privilege is an affirmative defense to defamation provided by Louisiana law for one who can prove that he made a statement (1) in good faith (2) on a matter in which he had an interest or a duty (3) to another person with a 'corresponding interest or duty.'" Rouly, 835 F.2d at 1130 (citations omitted). Good faith or lack of malice "means that 'the person making the statement must have reasonable grounds for believing that it is true and he must honestly believe that it is a correct statement.'" Id. (citations omitted). The plaintiff has the burden of proving malice or lack of good faith. Id.

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[4] Shell does not concede the falsity of the alleged defamatory statements. On the contrary, Shell contends the statements are true. Shell maintains that Stockstill's admission at trial he had routinely called B.J. Holcombe a "bitch" is sufficient to show that he did in fact engage in inappropriate conduct of a sexual nature.

The statements at issue here are entitled to a qualified privilege under Louisiana defamation law. The allegedly defamatory statements made to the EEOC related to the charge of discrimination that Stockstill filed against Shell. Both Shell and the EEOC had an interest or duty regarding the charge. The EEOC is authorized by law to investigate charges of discrimination against employers. Shell had a corresponding duty to cooperate in the investigation and an interest in defending itself against Stockstill's charge. It was Ann Ford's job to coordinate Shell's response to charges, such as Stockstill's, filed with the EEOC. And, as previously noted, Stockstill offered no evidence that Ford, or anyone else at Shell, had reason to believe the information supplied by "Skipper" Berne was not true. On the contrary, the evidence shows that Ford had reasonable grounds for believing that the information contained in the investigative file was accurate. Thus, Stockstill has failed to meet his burden of proving malice or lack of good faith.[5]

Lastly, Stockstill seeks reversal because the trial judge excluded testimony concerning Stockstill's prior charge of age discrimination against Shell. Stockstill cites no authority to

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[5] We are expressly refusing to decide Shell's cross appeal, in which Shell challenges the district court's denial of its motion for summary judgment based on an absolute privilege under federal law. The district court implicitly found, and we have expressly held, that Ford's statements to the EEOC are qualifiedly privileged under Louisiana law. Since the qualified privilege provides sufficient protection for Shell, this Court need not inquire whether Shell is entitled to greater protection. We express no opinion about whether federal common law accords an absolute privilege to statements made by employers to the EEOC in the course of an EEOC investigation. Nor do we decide whether federal law provides a qualified privilege different from or greater than the privilege supplied by Louisiana law.

support this argument; he merely contends that the trial judge's rulings on this issue were inconsistent. Shell's response to this purported basis for reversal is equally brief, though more persuasive. Shell notes that Stockstill made no offer of proof that would allow this Court to determine if a substantial right had been affected by the trial court's ruling, as required by Rule 103(a)(2) of the Federal Rules of Evidence. Generally speaking, "this circuit will not even consider the propriety of the decision to exclude the evidence at issue, if no offer of proof was made at trial." United States v. Winkle, 587 F.2d 705,710 (5th Cir.), cert. denied, 444 U.S. 827 (1979). While a formal proffer is not essential, the proponent of the evidence "must show in some fashion the substance of the proposed testimony." Id. There is no indication in the record as to precisely what evidence Stockstill wanted to present at trial. Therefore, we do not have an adequate basis for reviewing the district court's ruling.

The judgment of the district court is **AFFIRMED**

93-1324

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SHELL OIL COMPANY,
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Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court change Louisiana law regarding the defense of qualified privilege in a defamation action?

PARTIES TO THE PROCEEDING

1. Kendall Stockstill (hereinafter referred to as "Stockstill"), Plaintiff in the District Court and Petitioner

2. Shell Oil Company[1] (hereinafter referred to as "Shell"), Defendant in the District Court and Respondent (hereinafter referred to as "Shell")

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[1] Shell Oil Company is wholly owned by Shell Petroleum Inc. Shell Petroleum Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by The "Shell" Transport and Trading Company, p.l.c., which are publicly traded companies. Shell Oil Company has no subsidiaries which are less than wholly owned.

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No._____

IN THE

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OCTOBER TERM, 1993

KENDALL STOCKSTILL,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case involves a defamation claim filed by Kendall Stockstill against Shell Oil Company. The claim is based on statements made by a Shell employee to a supervisor at the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC") during the investigation of a charge of age discrimination.

The case was originally filed in the Civil District Court for the Parish of Orleans, State of Louisiana. It was removed to the United States District Court for the Eastern District of Louisiana on the basis of diversity of citizenship. The case was tried on April 13 and 14, 1992. At the conclusion of the Plaintiff's case, the District Court granted a judgment as a matter of law in accordance with Rule 50(a), Fed. R. Civ. Pro., in favor of Shell. On September 27,

1992 the United States Court of Appeals for the Fifth Circuit affirmed the Judgment.

In the Petition for Writ of Certiorari, Stockstill complains of the result caused by the application of Louisiana law to the facts of this case. Stockstill does not complain that the opinion of the Fifth Circuit violates the United States Constitution, a treaty, a federal statute, a federal ordinance, or any federal regulation. Stockstill does not complain that the opinion of the Fifth Circuit is in conflict with any opinion by any other federal court. Stockstill does not complain that the opinion of the Fifth Circuit is in conflict with any opinion of any state court of Louisiana. Stockstill does not even complain that the Fifth Circuit wrongly interpreted Louisiana law. Stockstill merely disagrees with the result caused by the application of Louisiana law to the facts of this case.

CITATION OF OPINIONS

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment entered in favor of Shell has been reported at 3 F.3d 868.

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to consider the Petition for Writ of Certiorari under 28 U.S.C. § 1254(1).

APPLICABLE RULES

This case does not involve any constitutional provisions, treaties, federal statutes, federal ordinances, or federal regulations.

This case involves only the law of defamation in the state of Louisiana.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in Court Below

a. Introduction

Kendall Stockstill is a former employee of Coastline Construction, Inc. (hereinafter referred to as "Coastline"), an independent contractor which supplies welding services to Shell. In the fall of 1988 Shell informed Coastline that Stockstill would no longer be allowed on Shell facilities. Shell had reason to believe that Stockstill had engaged in inappropriate conduct of a sexual nature toward a female employee.

Stockstill filed a charge of age discrimination with the EEOC. In the course of the investigation of this charge a Shell employee told an investigator for the EEOC that Stockstill had engaged in inappropriate conduct of a sexual nature.

b. Proceedings Before the District Court

On June 24, 1991, Kendall Stockstill filed Case No. 91-11914 against Shell in the Civil District Court for the Parish of Orleans, State of Louisiana, alleging defamation. The claim was based on the statements made by the Shell employee to the EEOC investigator. This suit was removed to the United States District Court for the Eastern District of Louisiana and assigned Civil Action No. 91-2527. (R.vol.4 p.181).

On September 17, 1991, Shell filed a Motion for Summary Judgment arguing that statements made to the EEOC in response to a charge of discrimination were entitled to a qualified privilege. (R.vol.4 p.93). Therefore, Stockstill

must prove malice or lack of good faith in order to prevail. There was no evidence that the statements made to the EEOC were made with malice or in bad faith. The Motion for Summary Judgment was denied by a Minute Entry dated October 7, 1991. (R.vol. 4 p.43).

On March 19, 1992, Shell filed Motions to Amend its Answer and the Pretrial Order to assert the defense of absolute privilege. Shell also filed an Amended Motion for Summary Judgment arguing that statements made to the EEOC in response to a charge of discrimination are entitled to an absolute privilege. (R.vol.3 p.723). The motions were denied by a Minute Entry dated April 7, 1992. (R.vol.4 p.2).

The case proceeded to trial before a jury on April 13, 1992. On April 14, 1992, at the conclusion of Stockstill's case, the District Court granted a Motion for Judgment as a matter of law. (R.vol.6 p.163). The Court held that there was no evidence that the statements made to the EEOC were made with malice or in bad faith. A judgment in favor of Shell was entered on the same day. (R.vol.4 p.1).

On April 30, 1992, Stockstill filed a Notice of Appeal. (R.vol.3 p.590). On May 13, 1992, Shell filed a Notice of Cross Appeal. (R.vol.3 p.587).

c. Proceedings Before the Fifth Circuit

On June 8, 1993 the United States Court of Appeals for the Fifth Circuit heard oral arguments. On September 27, 1993 the Fifth Circuit issued an opinion affirming the judgment entered by the District Court. On October 28, 1993 the Fifth Circuit denied a Motion for Rehearing by Stockstill.

d. Proceedings Before the Supreme Court

On or about December 24, 1993 Stockstill filed a Petition for Writ of Certiorari.

(ii) Statement of Facts

Barbara Jean (B.J.) Holcombe is a former employee of Shell Offshore Inc., a subsidiary of Shell. During the summer of 1988 Holcombe filed a charge of sexual harassment and discrimination against Shell with the EEOC. (R.vol.5 p.95). Shell conducted an investigation of the charge.

As part of the investigation an employee by the name of Galen "Skipper" Berne was interviewed. (R.vol.5 p.46). Berne told Shell's investigators that he had seen touching and heard name calling between Holcombe and a contract welder, Kendall Stockstill. Berne had also heard rumors that Stockstill placed a dildo in Holcombe's lunch bag. (R.vol.5 p.111-116).

As a result of the discussion with Skipper Berne, Shell advised Coastline, Stockstill's employer, that Stockstill would not be allowed on Shell property. (R.vol.5 p.70-76).

Stockstill filed a charge of age discrimination against Shell with the EEOC. (R.vol.5 p.132). Ann Ford, a Shell employee, was responsible for coordinating responses to charges filed with the EEOC. (R.vol.5 p.10). Ford had several telephone conversations with Althea Bertrand, an investigator for the EEOC, regarding Stockstill's charge of age discrimination. (R.vol.5 p.11-16).

The EEOC wanted to know why Stockstill had been barred from Shell property. On June 21, 1990 Ann Ford explained that Shell was not accusing Stockstill of sexual harassment but that he had engaged in conduct that was inappropriate and violated Shell's policies. (R.vol.5 p.18). This statement was based on information contained in the

investigative file regarding the charge of sexual harassment and discrimination filed by B.J. Holcombe. (R.vol.5 p.20).

The EEOC pressed Ford for specifics. (R.vol.5 p.18-20). On June 25, 1990, Ford told Bertrand that Stockstill's conduct was "inappropriate" and "of a sexual nature." (R.vol.5 p.23).

There were no further conversations with any officials of the EEOC. (R.vol.5 p.23). The investigative file regarding the charge of sexual harassment and discrimination filed by B.J. Holcombe was treated as confidential. The investigation was not discussed with anyone outside of Shell other than the EEOC. (R.vol.5 p.23-24).

At trial B.J. Holcombe testified that Kendall Stockstill called her a "bitch" which she considered to be inappropriate language. (R.vol.5 p.89, 97). Stockstill admitted that he called Holcombe a "bitch" but would not agree that such conduct was inappropriate. (R.vol.5 p.138).

SUMMARY OF THE ARGUMENT

It would be inappropriate for the Supreme Court to change Louisiana law regarding the defense of qualified privilege in a defamation action. *Erie Railroad Company v. Thompkins*, 304 U.S. 64 (1938).

ARGUMENT

1. Should the Supreme Court change Louisiana law regarding the defense of qualified privilege in a defamation action?

The trial of this defamation case ended in a Judgment as a Matter of Law. The District Court held that the communication that formed the basis for the action was entitled to a qualified privilege under Louisiana law and Stockstill had presented no evidence of malice or bad faith that would defeat the privilege. The Fifth Circuit agreed and affirmed the judgment.

Stockstill has petitioned the Supreme Court for a Writ of Certiorari in order that the Court might "redefine" the defense of qualified privilege in a defamation action under Louisiana law. Stockstill does not complain that the opinion of the Fifth Circuit violates the United States Constitution, a treaty, a federal statute, a federal ordinance, or any federal regulation. Stockstill does not complain that the opinion of the Fifth Circuit is in conflict with any opinion by any other federal court. Stockstill does not complain that the opinion of the Fifth Circuit is in conflict with any opinion of any state court of Louisiana.

Stockstill does not even complain that the Fifth Circuit wrongly interpreted Louisiana law. Indeed, Stockstill correctly cites the elements of a qualified privilege as it is currently recognized in Louisiana.

Stockstill wants the Supreme Court to announce a new law of qualified privilege for the State of Louisiana. It would be inappropriate for the Supreme Court to do so.

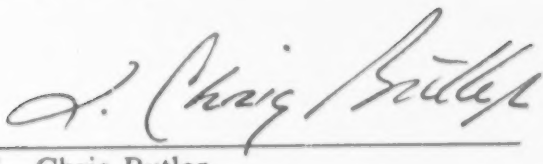
Jurisdiction of this case is based on diversity of citizenship. In diversity cases federal courts are bound by the decisions of the state courts on matters of state law. *Erie Railroad Company v. Thompkins, supra.* A federal court must take the law as it finds it. A federal court may not skirt the clear import of state decisional law solely because the result is harsh. *Parson v. United States*, 460 F.2d 228 (5th Cir. 1972).

Further, the Supreme Court has held that it should defer to the lower federal courts on questions regarding the interpretation of state law. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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